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Constitutional Law - Legislative Privilege - Federal Common Law Evidentiary Privilege - State Legislators [Note]

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CONSTITUTIONAL LAW—LEGISLATIVE PRIVILEGE—FEDERAL COMMON LAW EVIDENTIARY PRIVILEGE—STATE LEGISLATORS—The United States Court of Appeals for the Third Circuit has held that a state legislator has no privilege under federal or state constitutions to demand the quashing of subpoenas duces tecum issued by a federal grand jury regarding legislative documents relevant to allegedly criminal activities, but that a limited federal common law evidentiary privilege may be available to him.

In re Grand Jury Proceedings, 563 F.2d 577 (3d Cir. 1977).

While investigating allegations of mail fraud, racketeering, and tax evasion, a federal grand jury in the Eastern District of Pennsylvania issued subpoenas duces tecum to Pennsylvania State Senator Henry J. Cianfrani, the Executive Director of the Pennsylvania Senate Majority Appropriations Committee, the Chief Clerk of the Pennsylvania Senate, the auditors of the committee, and the payroll clerk of the committee.[1] The subpoenas directed the parties named to appear and produce certain documents of the Senate Majority Appropriations Committee, including payroll records and nonpayroll committee records.[2] Two days before the hearing date, counsel for the subpoenaed parties informed the government that the witnesses would decline to produce the documents and would assert grounds of certain privileges and immunities before the grand jury.[3]

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1. Brief for Appellant "C" at 1, *In re* Grand Jury Proceedings, 563 F.2d 577 (3d Cir. 1977). The relevant subpoenas duces tecum were later given the following letter designation:

Letter	Subpoenaed Party
"A"	Pennsylvania State Senator Henry J. Cianfrani
"B"	K. Paul Muench, Executive Director of Pennsylvania Senate Majority Appropriations Committee
"C"	Thomas J. Kalman, Chief Clerk, Pennsylvania Senate
"D"	Price Waterhouse and Co., Auditors of the Committee
"E"	Angelina DiMarino, Payroll Clerk of the Committee

Id.

2. *In re* Grand Jury Proceedings, 563 F.2d 577, 579 (3d Cir. 1977). The subpoenas required production of the committee budget, audits of the committee, all payroll records and nonpayroll financial records, expense account records, and all correspondence, memoranda, and minutes of the committee, executive or board meetings. *Id.*

3. The Government filed a Petition to Enforce Compliance and a Schofield Affidavit to show that the items sought were relevant, were within the grand jury's jurisdiction, and were not sought primarily for another purpose. *See In re* Grand Jury Proceedings (Schofield), 507

Senator Cianfrani filed a motion for leave to intervene in the proceedings directing subpoenas duces tecum to the other parties, and the Chief Clerk of the Senate moved to intervene in regard to the subpoenas duces tecum directed to Senator Cianfrani.[4] Both motions for intervention were granted in a hearing before the district court.[5]

At the subsequent proceeding to enforce the subpoenas, the district court judge held that although the speech or debate clause of the United States Constitution was inapplicable, a common law speech or debate privilege could be invoked by a state legislator in federal grand jury proceedings involving state legislative activity.[6] The court held that some of the documents sought by the subpoenas duces tecum were protected by the common law privilege, but that others were not; it suggested that the subpoenas be amended[7] to restrict the scope of questioning of potential grand jury witnesses to acts which are not part of the legislative process.[8]

F.2d 963, 966 (3d Cir. 1975) (government must show by affidavit the relevancy of the material sought before subpoenas duces tecum will be enforced in grand jury proceedings). The matter was referred to a district court judge, who, pursuant to a motion by Senator Cianfrani, entered an order impounding all pleadings to avoid any prejudice publicity might create due to the senator's public position. 563 F.2d at 579.

4. 563 F.2d at 579. Intervention was sought by both parties in order to be permitted to appeal. Generally, an appeal will not lie when a claim of privilege has been denied except in cases where a witness has been held in contempt for refusing to testify before a grand jury. *See, e.g.*, United States v. Ryan, 402 U.S. 530 (1971) (only recourse after denial to quash subpoenas duces tecum is to refuse to produce documents and risk contempt of court). An intervenor, however, will be permitted by the courts to appeal when privilege is denied. The reasoning behind this policy is that a witness will probably not risk contempt to preserve the privilege asserted on behalf of someone else. 563 F.2d at 580. *See also* Nixon v. United States, 418 U.S. 683, 691 (1974) (President of the United States, by virtue of his office, permitted to appeal subpoena duces tecum without intervening or incurring citation for contempt); United States v. Doe, 455 F.2d 753, 756, *aff'd in part, vacated in part on other grounds sub nom.* Gravel v. United States, 408 U.S. 606 (1972) (United States Senator permitted to intervene in subpoena duces tecum issued to third parties and appeal therefore allowed).

5. 563 F.2d at 579.

6. *In re* Grand Jury Proceedings, Miscellaneous No. 77-241, slip op. at 32 (E.D. Pa. July 20, 1977).

7. *See* 563 F.2d at 580. The subpoenas as later amended ordered production of all payroll records of persons employed by the committee, excluding records of the Senators on the Committee and those of their staff members who did not work on the committee, and all nonpayroll committee financial records excluding the records of any Senator on the committee except where those records were also records of the committee. The primary difference between the original and amended subpoenas was the exclusion of the records directly concerning Senators and their staff members not on the committee. *Id.*

8. *Id.* The court also issued a protective order which read, in pertinent part:

[N]o witness before the Federal Grand Jury may be questioned about acts of any

On appeal, by Senator Cianfrani and the Chief Clerk in their capacity as intervenors,[9] the Third Circuit affirmed the district court ruling but narrowed its scope.[10] After a brief consideration of the history and policy behind the speech or debate clause of the United States Constitution,[11] the court concluded that the clause applies only to federal congressmen and not to members of state legislatures.[12] The court also rejected the appellants' contention that the state constitution's speech or debate clause provided the claimed privilege in federal proceedings.[13]

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legislator or aide as are an intregal part of the deliberative or communicative processes by which the legislators participate in Committee or Senate proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of the State Senate, or about records relating to such acts.

Nor shall any witness be questioned concerning the motives and purposes behind any legislator's legislative acts as defined above.

Id. Orders impounding the record (as protection against prejudicial publicity, *see* note 3 *supra* and staying the proceedings pending appeal were also issued. 563 F.2d at 580. Both the Senator and Chief Clerk filed Notices of Appeal in the district court, Brief for Appellant "A" at 3, *In re* Grand Jury Proceedngs, 563 F.2d 577 (3d Cir. 1977), and the appeal was argued on August 23, 1977, before the United States Court of Appeals for the Third Circuit. 563 F.2d at 577.

9. The court asserted its jurisdiction since both appellants were appealing from their positions as intervenors and not as individuals against whom a claim of privilege had been denied. *Id.* at 580. *See* note 4 *supra.*

10. The Third Circuit affirmed the district court's decision that although a federal common law speech or debate privilege exists, it is a limited privilege which may not be extended so as to be used by a legislator to obtain immunity from prosecution for criminal activity. The standard which the district court had used excluded those activities of a legislator which did not relate to the legislative policy-formulation process, *In re* Grand Jury Proceedings, Miscellaneous No. 77-241, slip op. at 44 (E.D. Pa. July 20, 1977), while the Third Circuit narrowed the standard to apply the speech or debate privilege to a legislator in those matters "performed in a strictly legislative capacity, motivations for such action, or utterances in the course of his legislative duties." 563 F.2d at 585. Therefore, payroll records could be subpoenaed in grand jury investigations of allegedly criminal activity. *Id.*

11. 563 F.2d at 580-81. *See also* notes 29-32 and accompanying text *infra.* The speech or debate clause in pertinent part provides:

The senators and representatives . . . shall in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

U.S. CONST. art. I, § 6, cl. 1.

12. 563 F.2d at 580-81. The phraseology of the federal clause limited its application to United States Congressmen and their aides. *Id.* at 581.

13. 563 F.2d at 582. The relevant part of the Pennsylvania Constitution provides:

The members of the General Assembly shall in all cases, except treason, felony, violation of their oath of office, and breach of surety of the peace, be privileged from arrest during their attendance at the sessions of their respective Houses and in going to and

The court believed, however, that a federal common law evidentiary privilege was available under Federal Rule of Evidence 501.[14] The court noted the disagreement that arose in the Seventh Circuit over this issue in *United States v. Craig*,[15] and found the opinion of the panel recognizing the privilege more persuasive than the opinion of the court en banc rejecting it.[16] The court admitted that the existence of such a privilege could impede the prosecution of legislators who abuse their public trust. The policy behind the federal speech or debate common law privilege, however, was the same as that behind the adoption of the speech or debate clause in the constitutions of the United States and many states. Thus, the existence of the privilege was necessary to protect conscientious legislators from being hampered in their work by vexations and time-consuming lawsuits regarding performance of their legislative duties.[17] The privilege, however, was viewed as a limited one. It would not protect a legislator from being answerable for criminal activities or other activity outside the sphere of his legislative duties, and

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returning from the same; and for any speech or debate in either House they shall not be questioned in any other place.

PA. CONST. art. 2, § 15. The appellants had asserted that the state constitution's speech or debate clause controlled because it had been enacted before the ninth, tenth, and eleventh amendments to the United States Constitution which made the federal laws applicable to the states. The court rejected this contention on grounds the federal supremacy clause enabled the United States government to take jurisdiction over a state senator accused of violating federal criminal statutes. Separation of powers permitted by the state constitution's speech or debate clause was viable only between co-equal branches of state government and not between federal and state governments. Additionally, there was no justification for permitting state legislators to assert an immunity to prosecution under federal criminal laws when no similar immunity existed for United States Congressmen.

14. *Id.* at 583. Rule 501 of the Federal Rules of Evidence states that:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501.

15. United States v. Craig, 528 F.2d 773 (7th Cir.), *rev'd en banc*, 537 F.2d 957 (7th Cir.) (state legislator accused of mail fraud and extortion permitted to claim federal common law speech or debate privilege, but waived it by testifying voluntarily), *cert. denied sub nom.* Markert v. United States, 425 U.S. 973 (1976). *See* note 44 and accompanying text *infra*.

16. 563 F.2d at 582-83.

17. *Id.* at 583.

would therefore bear no similarity to immunity from criminal prosecution.[18]

The court additionally rejected the appellants' argument that since legislative action depends on aides who are paid for their work, aides' payroll records should be within the privilege. The court determined that such an interpretation would give the privilege wider coverage than the speech or debate clause and that to give such meaning to the privilege would unnecessarily hinder criminal law enforcement.[19]

In a separate opinion, Judge Gibbons concurred in the affirmation of the district court's order but disagreed with the majority opinion that there is a federal common law speech or debate privilege against criminal prosecution of a state legislator for a federal crime.[20] He treated much of the discussion in the majority opinion as mere dictum, since although the majority discussed the scope of the privilege recognized by the court below, only the scope of the privilege not recognized by the district court was at issue.[21] Nevertheless, it was necessary to explain his opposing viewpoint, Judge Gibbons asserted, since the majority had gratuitously discussed its views at length.[22]

Expressing uneasiness with the scope of the privilege delineated by the majority, Judge Gibbons questioned whether it might be applied to the anomalous situation in which a legislator might attempt to assert the privilege to prevent evidence from being admitted to aid in another party's defense.[23] Judge Gibbons was also

18. *Id.* at 583-84. *See* Gravel v. United States, 408 U.S. 606 (1972) (United States Senator's speech or debate privilege does not extend to protection from questioning regarding how materials were obtained or published); United States v. Brewster, 408 U.S. 501 (1972) (United States Senator's acceptance of bribe was not part of legislative process and therefore not privileged). The privilege would bar evidence of legislative acts, speech, or motivation from litigious proceedings, and is thus one of nonevidentiary use rather than of nondisclosure since legislative acts are generally public knowledge. Criminal activity is not within the realm of legislative duty and thus evidence regarding such activity may be introduced into evidence. 563 F.2d at 584.

19. 563 F.2d at 585.

20. *Id.* at 586.

21. *Id.*

22. *Id.* The majority had actually rendered an advisory opinion, Judge Gibbons argued. Senator Cianfrani and the Chief Clerk were not even asserting privilege, but were each merely attempting to prevent testimony and compliance with the subpoena duces tecum by the other. Additionally, their arguments focused on records which would not be covered by privilege if it were asserted. Thus, Gibbons maintained, the majority's remarks were wholly gratuitous. *Id.*

23. *Id.*

concerned by the fact that there was no evidence that a legislator might be hampered in his legislative activity.[24] He additionally speculated whether the privilege would extend to civil suits, arguing that in civil litigation the suppression of evidence because of privilege would prevent legislators from being held accountable for their actions.[25] If the privilege were, however, only to apply to criminal cases, Judge Gibbons asserted that there would be no reason for its existence because of the fifth amendment protection against self-incrimination.[26] Concerned that the majority's interpretation of evidentiary privilege would lead to assertions of privilege beyond all reasonable interpretations of the fifth amendment,[27] Judge Gibbons rejected the idea of a federal evidentiary privilege[28] as had the court en banc in *Craig*.

The concept of a legislative speech or debate privilege is deeply rooted in the histories of both England and the United States. From the earliest days of the British Parliament, conflicts existed between that legislative body and the disproportionately more powerful Crown. As Parliament gained in power, it attempted to ensure its autonomy, with actions culminating in the English Bill of Rights in 1689.[29] The Bill prevented the monarch or anyone else in the country from harrassing legislators for their lawmaking activities.[30]

The same concept was included in the United States Constitution in the speech or debate clause.[31] Again, the purpose was to further legislative autonomy and separation of powers in order to allow

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24. *Id.* at 587.

25. *Id.*

26. *Id.* The Third Circuit had already held that a federal grand jury was entitled to subpoena and receive pertinent records from the Commonwealth of Pennsylvania, even when the Commonwealth had an interest in the confidentiality of the records. *In re* Grand Jury Impaneled Jan. 21, 1975, 541 F.2d 373, 377 (3d Cir. 1976) (in absence of statute, no report privilege existed to enable quashing of subpoena duces tecum requesting agreements filed with prothonotary).

27. 563 F.2d at 587.

28. *Id.* at 588.

29. CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 117 (1972) (quoting the English Bill of Rights, 1 W. & M., Sess. 2, c. 2).

30. Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Court*, 2 SUFFOLK L. REV. 1 (1968) [hereinafter cited as Cella]. *See* Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 COLUM. L.J. 131 (1910); Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113 (1973) [hereinafter cited as Reinstein].

31. U.S. CONST. art. I, § 6, cl. 1. *See* note 11 *supra*.

legislators greater independence in their lawmaking activities. Relieving legislators from accountability for such activities would theoretically allow them freedom of thought and they would be better able to work for the good of their constituents. The clause was not designed to further the individual purposes of the legislators but to serve the interests of the citizens of the United States.[32]

The speech or debate clause was construed very broadly at first in order to effectuate its purpose. In an early nineteenth century case, *Coffin v. Coffin*,[33] a United States Congressman was sued by another Congressman for slander, as a result of allegations, made while discussing the introduction of a bill, that the second Congressman was guilty of a felony. The Massachusetts Supreme Court stated that to give full meaning to the speech or debate clause, it had to be construed liberally; thus, a legislator should not only be protected for his utterances on the House floor, but for all activities done in the line of his legislative duty.[34]

Later cases decided in federal courts, including the United States Supreme Court, adhered to the broad interpretation given to the speech or debate clause in *Coffin*.[35] Only by this liberal interpretation, courts agreed, could the purpose of the speech or debate clause, as projected by the framers of the Constitution, be implemented.[36]

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32. Tenney v. Brandhove, 341 U.S. 367, 373 (1951) (acts of California senator privileged because within sphere of legislative activity).

33. 4 Mass. 1, 3 Am. Dec. 189 (1808).

34. *Id.* at 9-10, 3 Am. Dec. at 193-94. In *Coffin*, however, the defendant was adjudged guilty, since slander was not part of the congressman's legislative activities. *See* Cella, *supra* note 30, at 20-28.

35. *See* Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) (actions of Senate subcommittee within sphere of legislative activity so privileged); United States v. Johnson, 383 U.S. 169 (1965) (Congressman immune from prosecution for criminal activity related to speech made in House); Tenney v. Brandhove, 341 U.S. 367 (1951) (acts of California Senator privileged because within the sphere of legislative activity); Cochran v. Couzens, 42 F.2d 783 (D.C. Cir.) (Senator had absolute privilege regarding alleged defamation uttered on Senate floor), *cert. denied*, 282 U.S. 874 (1930); Kilbourn v. Thompson, 103 U.S. 168 (1880) (sergeant-at-arms of legislature liable for damages for false imprisonment but legislators immune).

36. This included not only activity within legislative chambers, but those activities connected with lawmaking which occurred outside the chamber walls. It also included resolutions, voting, and written reports and other activities which were within the realm of lawmaking but were not specifically speech or debate. *See* Carr v. Monroe Mfg. Co., 431 F.2d 384, 389 (5th Cir. 1970) (administrative records of State Employment Security Commission not privileged), *cert. denied*, 400 U.S. 1000 (1971); United States v. Brewster, 408 U.S. 501 (1972) (United States Senator's acceptance of bribe not part of legislative process and therefore not privileged); Tenney v. Brandhove, 341 U.S. 367 (1951) (acts of California Senator privileged because within sphere of legislative activity); Kilbourn v. Thompson, 103 U.S. 168 (1880)

The Supreme Court, however, limited the application of the speech or debate clause in 1972 with its decisions in *Gravel v. United States*[37] and *United States v. Brewster*,[38] both indicating that any existing privilege was an evidentiary privilege and would not lead to an absolute immunity from prosecution. Although both cases have been subject to criticism,[39] their holdings have since been followed.[40] Nevertheless, the speech or debate clause in the United States Constitution does not apply to a state legislator.

Many states, including Pennsylvania, have speech or debate clauses similar to the federal one in their constitutions.[41] Several Pennyslvania cases have held that the state's speech or debate clause should be interpreted in the same manner as the clause in

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(sergeant-at-arms of legislature liable for damages for false imprisonment but legislators immune); Coffin v. Coffin, 4 Mass. 1, 3 Am. Dec. 189 (1808) (speech or debate clause to be construed liberally but slander not within legislative process and therefore not privileged). *See also* Reinstein, *supra* note 30, at 1149-57. In addition, the privilege was extended to aides of legislators who were involved in legislative activities. Doe v. McMillan, 412 U.S. 306 (1973) (Congressmen and their aides privileged as to subcommittee report, but Superintendent of Documents is not); Gravel v. United States, 408 U.S. 606, 616 (1972) (United States Senator's aide allowed to be interrogated so long as questions not directed to the senator's legislative activities).

37. 408 U.S. 606 (1972). In *Gravel*, a United States Senator and his aide were issued subpoenas by a federal grand jury inquiring into the publication of the Pentagon Papers which had previously been read into public record. The Supreme Court held that although the speech or debate clause was designed to ensure freedom of speech and deliberation to federal legislators, the privilege was limited. Even though a senator could not be questioned about his activities in committee, he could be interrogated about how he obtained materials used and the methods used to secure publication of a committee record. His aides would only be protected on the same matters as the senator would be.

38. 408 U.S. 501 (1972). The *Brewster* case concerned a United States Senator who was charged with accepting bribes for official acts. The Court held that criminal acts were not part of the legislative process and the legislative privilege of the speech or debate clause therefore did not apply.

39. *See* Erwin, *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 59 VA. L. REV. 175 (1973) [hereinafter cited as Erwin]; Reinstein, *supra* note 30. Arguably, the Court in *Gravel* made an attempt to distinguish legislative from nonlegislative activity without giving clear guidelines to be followed in the future. *See* Erwin, *supra*, at 184; Reinstein, *supra* note 30, at 1149. It has also been feared that following the precedents set by these two cases would hamper legislators irreparably in their lawmaking activity. *Id.*

40. Dickey v. CBS, Inc., 387 F. Supp. 1332 (E.D. Pa. 1975) (United States Representative not permitted to quash subpoena or receive protective order to prevent him from appearing for oral deposition where broadcasting network sued for alleged slander by Representative on network broadcast). *But see* Doe v. McMillan, 412 U.S. 306 (1973) (Congressmen and their aides privileged as to subcommittee report but Superintendent of Documents is not); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) (actions of Senate subcommittee within sphere of legislative activity so privileged).

41. PA. CONST. art. 2, § 15. *See* note 13 *supra*.

the Federal Constitution since the provisions are analagous and no basis has been found for distinguishing them.[42] Thus, applying the federal standards expressed in *Gravel* and *Brewster*, a state legislator is constitutionally privileged only to the extent of his legislative activities.[43] However, because of the doctrine of federal supremacy, a state constitution's speech or debate clause is inapplicable in a prosecution of a state legislator for a federal criminal offense, since separation of powers may not be invoked.

Beyond the constitutionally granted privilege, there is also a viable common law speech or debate privilege, recognized by the Seventh Circuit panel in *Craig*,[44] which the court in *Grand Jury* considered and adopted.[45] Apparently afraid of potential extensions of the privilege, however, the Seventh Circuit en banc reversed the panel decision of *Craig*.[46] The First Circuit has also chosen to construe the

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42. Consumers Educ. and Protective Ass'n v. Nolan, 470 Pa. 372, 383, 368 A.2d 675, 681 (1977) (Pennsylvania speech or debate clause construed in same manner as federal); Dickey v. CBS, Inc., 387 F. Supp. 1332, 1336 (E.D. Pa. 1975) (United States Representative not permitted to quash subpoena or receive protective order to prevent him from appearing for oral deposition where broadcasting network was sued for alleged slander by Representative on network broadcast).

43 Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1972). *See* notes 37-39 *supra*.

44. United States v. Craig, 528 F.2d 773 (7th Cir.), *rev'd en banc*, 537 F.2d 957 (7th Cir.), *cert. denied sub nom.* Markert v. United States, 425 U.S. 973 (1976). In *Craig*, two members of the Illinois House of Representatives, indicted on charges of political corruption, attempted to invoke a legislative evidentiary privilege to prevent the introduction into evidence at their trial the statements made by one of them under subpoena during a grand jury investigation. 528 F.2d at 774. The court panel determined that the purpose behind the constitutional speech or debate clause was vital, *id.* at 779, and that the privilege should extend to state legislators, *id.* at 778. Since neither the federal nor the state constitutional speech and debate clauses applied in a federal prosecution of a state legislator, the court held that the federal common law speech or debate privilege, as developed under Federal Rule of Evidence 501, encompassed this type of proceeding. *Id.* at 776. However, in this instance, the legislator had waived his privilege by testifying voluntarily and thus his prior statements were admissible. *Id.* at 781.

In a separate opinion, subsequently adopted by the court en banc, Judge Tone expressed his concurrence in the result, that the legislator's previous testimony should be admitted, *id.*, but asserted that the evidentiary privilege should be equated with common law official immunity, *id.* at 782. Since common law official immunity had not been extended to criminal liability. The speech or debate privilege should also not apply in a criminal action against a legislator. *Id. See* 8 RUT.-CAM. L.J. 550 (1977) (criticized the en banc decision in *Craig* for denying application of an evidentiary privilege to a state legislator in a federal criminal prosecution). *But see* 45 CIN. L. REV. 325 (1976) (evaluated the panel decision in *Craig* before the en banc decision in *Craig* and found more merit in Judge Tone's concurrence than in the panel opinion).

45. 563 F.2d 577, 583 (1977).

46. 537 F.2d 957 (7th Cir.), *cert. denied sub nom.* Markert v. United States, 425 U.S. 973 (1976).

speech or debate privilege so narrowly as to negate its application in any regard to a federal criminal prosecution of a state legislator in *United States v. DiCarlo.*[47] Both the *Craig* and *DiCarlo* courts feared that once a federal common law evidentiary privilege was extended to state legislators faced with criminal charges, the privilege would be applied indiscriminately to shield legislators from being answerable for criminal activity if they could in any way relate it to their legislative duties, and thus, in effect, grant them immunity. Preferring to abandon the privilege altogether rather than face the possibility of its running rampant, both courts refused to apply a common law privilege to state legislators.

The *Grand Jury* court, however, expounded the more believable view that the privilege would be self-limiting, since the courts would interpret it in light of reason and experience, as called for by Federal Rule of Evidence 501. Indeed, the holding of the *Grand Jury* court itself proved that such limitation was possible. It construed the evidentiary privilege narrowly, so that those documents specifically related to legislative activity, such as correspondence and minutes of meetings, were shielded from public scrutiny, but those related to activities outside the lawmaking function, such as payroll records containing purportedly incriminating material, were correctly not protected but were required to be produced.

If the holdings in *Craig* and *DiCarlo* are to be followed, the development of an important area in the federal common law evidentiary privileges, called for in Federal Rule of Evidence 501, would be inhibited. Instead, a balancing of interests should be made, weighing the policy for protection of lawmakers to encourage their efficient functioning against the need for the public to know the truth.[48]

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47. 565 F.2d 802 (1st Cir. 1977), *cert. denied*, 98 S. Ct. 1487 (1978). A state legislator was indicted for allegedly extorting funds from a contractor. The court did not apply legislative privilege, reasoning that the federal common law speech or debate privilege was limited in application, *id.* at 806, and that to apply it as had the *Grand Jury* court would be to hamper the search for truth needlessly. *Id.* at 806-07. The *DiCarlo* court instead found merit in Judge Gibbon's dissent. *Id.* at 807.

48. Carr v. Monroe Mfg. Co., 431 F.2d 384, 399 (5th Cir. 1970) (administrative records of State Employment Security Commission not privileged information).

In most instances, a federal court is bound to follow the substantive law of the state in which it sits. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Rules of evidence, however, are procedural. They varied from state to state and the differences proved to be quite confusing. Therefore, in 1961, the Judicial Conference of the United States empowered the Supreme Court to look into the advisability of drafting uniform rules of evidence for use in the federal courts. It was found that such rules were both feasible and advisable. But when the Senate and House of Representatives attempted to agree on rules regarding privilege, no agreement

In recent cases in which other privileges have been asserted, there has been little question that the truthseeking function of introducing evidence has prevailed.[49] However, the speech or debate clause of the Constitution and the privileges which it sets forth should retain great weight.[50] It is up to each court confronted with the issue of privilege to make an evaluation and balancing of the competing policies.

The *Grand Jury* court made such an evaluation, and in balancing the interests found there was room both for the public's right to know and for legislative autonomy. The scope of privilege which the *Craig* and *DiCarlo* courts and Judge Gibbons in his dissent in *Grand Jury* feared would unreasonably expand, was actually narrowly focused by the majority to only those areas where the actions of a legislator would be unquestionably part of his lawmaking functions; other activites, including criminal acts, were affored no protection.

As indicated by the trilogy of *Craig, DiCarlo,* and *Grand Jury,* the area of federal common law evidentiary privilege regarding a criminal prosecution of a state legislator is uncertain. Hopefully, the United States Supreme Court will take the opportunity to settle the conflict in this area in which it appears that the question will continue to arise with greater frequency.

For now, the decision of the court in *In re Grand Jury Proceedings* upholding a federal common law evidentiary privilege seems to follow most closely the intent of the legislators who developed Federal Rule of Evidence 501. The policy behind the speech or debate clause was deemed to be of such great national concern by the framers of the United States Constitution as to merit inclusion in that important document, and this view was also espoused by the framers of many state constitutions and by many jurists in the intervening years. Evidentiary privilege is too important to be abolished by judicial fiat by modern courts, especially since the courts have power to control its application to prevent it from shielding criminal

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could be reached. In order to prevent a total deadlock, a compromise was reached in which a federal common law privilege was to be developed and used in federal cases, as called for by Federal Rule of Evidence 501. *See* [1974] U.S. CODE & CONG. AD. NEWS 7051.

49. Patterson v. Norfolk & Western Ry., 489 F.2d 303 (6th Cir. 1973) (evidence admitted in federal court despite state rule of privilege); Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970) (attorney-client privilege not absolute when protection of public interests at stake).

50. *See* note 44 *supra* (discussion of *Craig*). *See also* United States v. Mandel, 415 F. Supp. 1025 (D. Md. 1976) (doctrine of legislative immunity, although a vital shield to legislators, does not shield executives even in lawmaking activities).

activity. In this manner, the privilege will retain its vitality and still serve the public by protecting legislators in their lawmaking functions.[51]

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51. Allowing the courts to decide on a case-by-case basis in this area has precedent in the doctrine of official immunity, which is applied according to the person who attempts to invoke immunity and the surrounding circumstances. *See* United States v. DiCarlo, 565 F.2d at 806.